

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

SCOTT LEROY NICHOLS,)
Petitioner,) 2:04-cv-01540-JCM-CWH
vs.) ORDER
JAMES G. COX, *et al.*,)
Respondents.) /

Before the court for a decision is an application for a writ of habeas corpus filed by Scott Leroy Nichols, a Nevada prisoner. ECF No. 81.

I. FACTUAL AND PROCEDURAL HISTORY

In 1999, Nichols was convicted in Nevada's Fourth Judicial District Court on two counts of drug trafficking and sentenced to two life terms. The Nevada Supreme Court recounted some of the facts of the case as follows:

On August 31, 1998, Nichols purchased thirty-nine bottles of ephedrine from a convenience store in West Wendover. Rebecca Morley, the store clerk, knowing that ephedrine could be used to manufacture methamphetamine, called the West Wendover police. The police asked her to call them back in the event Nichols returned.

On September 2, 1998, Nichols returned to the convenience store. This time, he purchased twenty-two bottles of ephedrine, and Morley again called the police. Sergeant Wiskerchen and Patrolman Henry Boyd responded to the call. Nichols had

1 since left the store, so Morley showed the officers surveillance tape footage of
 2 Nichols and described the automobile that Nichols drove.

3 Officers Wiskerchen and Boyd went looking for Nichols' vehicle. They
 4 discovered the car parked at the Rainbow Casino Hotel and observed Nichols entering
 5 the casino. The officers approached Nichols inside and asked to see identification.
 6 Nichols consented. Sergeant Wiskerchen returned to the patrol car and radioed
 7 dispatch, requesting a warrants-check on Nichols. When dispatch responded that
 8 Nichols had an outstanding warrant for a probation violation, the officers reentered
 9 the casino and promptly arrested Nichols. As the officers brought Nichols to the
 10 patrol car, a woman approached and asked what Nichols was being arrested for and
 where he was going. The woman was later identified as Shawna Wilder.

11 Officers Wiskerchen and Boyd transported Nichols to the West Wendover
 12 Police Department. Sergeant Wiskerchen briefed the arrest to Officer Gerald Cook
 13 and Detective Sandra Gunter, who then sought to locate the hotel where Nichols had
 14 been staying. At the Rainbow Hotel, the officers discovered that a room had been
 registered to a "Lisa Nichols." The registration information indicated the Lisa
 15 Nichols had the same Salt Lake City address as Scott Nichols.

16 Rick Portella, an employee of the hotel, told the officers that Lisa Nichols had
 17 checked out at approximately 10:00 a.m. He was unsure, however, whether Lisa had
 18 left the room yet. It was now just past 11:00 a.m., the hotel checkout time. Portella
 19 indicated to the officers that they could inspect Nichols' room, and he accompanied
 20 them to the room door.

21 Portella then knocked at the door and announced himself as part of the
 22 management. When there was no response from inside, he attempted to open the door
 23 with a master key. At this moment, Wilder opened the door from the inside. Cook
 24 later testified to smelling the pungent odor that was similar to the smell of cleaning
 25 fluids. Wilder told the officers that Lisa Nichols had left the room earlier. Wilder
 admitted that she knew Scott Nichols and had stayed in the room with him.

26 The officers informed Wilder that they were sealing the room and that they
 intended to procure a search warrant. After searching Wilder's purse, they permitted
 her to leave. After obtaining a warrant, the officers searched the hotel room and
 discovered a number of containers containing marijuana, methamphetamine and drug
 paraphernalia. Ultimately, the police recovered over forty-seven grams of
 methamphetamine.

27 The search warrant also authorized the officers to search Nichols' automobile.
 28 The police found additional drug paraphernalia in the car's trunk, including a propane
 torch.

29 Scott Nichols was charged with two counts of trafficking in over an ounce
 30 (twenty-eight grams) of a controlled substance, which is a class A felony, punishable
 by life imprisonment with eligibility for parole after ten years. [Fn: See NRS
 31 453.3385.] (The State dropped a third charge of marijuana possession.) Finding
 32 probable cause, the Elko Justice Court bound Nichols over on the trafficking charges.

Nichols filed a motion to suppress all evidence, arguing that it was the result of an illegal seizure. On August 27, 1999, a hearing was held on the motion to suppress, and the district court denied the motion on the bases that the officers properly stopped Nichols in the casino and that Wilder had no expectation of privacy in the room after checkout time. . . .

4 || ECF No. 46-25, p. 2-4

The Nevada Supreme Court affirmed the judgment of the district court on February 7, 2001.

Having retained attorney Andrew M. Leavitt, Nichols filed, on February 1, 2002, a petition for writ of habeas corpus in the Fourth Judicial District Court for Nevada. The court conducted an evidentiary hearing on July 11, 2003. On July 31, 2003, the court entered an order denying the petition, with the clerk issuing a notice of entry of order on August 28, 2003.

10 Nichols appealed. On September 15, 2004, the Nevada Supreme Court issued an order of
11 affirmation. The remittitur was issued on October 12, 2004.

12 On November 8, 2004, this court received Nichols' federal petition seeking relief under 28
13 U.S.C. § 2254. On August 31, 2005, Nichols filed an amended petition. Then, after appointment of
14 counsel, he filed, on January 11, 2008, another amended petition, styled as his "first amended
15 petition for writ of habeas corpus."

16 Respondents moved to dismiss the petition, arguing that each ground was unexhausted. The
17 court granted the motion, in part, finding ground 2 partially unexhausted and grounds 3-6 wholly
18 unexhausted. Nichols then moved for a stay under *Rhines v. Weber*, 544 U.S. 269 (2005), so he
19 could return to state court to exhaust such claims. That motion was granted on July 14, 2008.

On August 28, 2008, Nichols filed a petition for writ of habeas corpus in the Fourth Judicial District Court for Nevada. The court denied the petition on June 9, 2009. Nichols appealed. The Nevada Supreme Court affirmed the lower court in an order entered on November 8, 2010. The remittitur was issued on December 3, 2010.

On May 9, 2011, this court granted Nichols' motion and reopened these proceedings and ordered that an amended petition be filed.

1 On June 23, 2011, he filed the “second amended petition” that is now before the court for
2 decision. On July 7, 2011, Nichols filed a declaration abandoning a portion of ground 2.

3 On April 13, 2012, respondents filed a motion to dismiss grounds 3 through 6 of the second
4 amended petition on the ground that the claims are procedurally defaulted. Nichols opposed the
5 motion, arguing that he could show cause and prejudice to overcome his procedural defaults. On
6 March 26, 2013, this court denied the motion without prejudice and ordered respondents to file an
7 answer which was to “include substantive arguments on the merits as to each ground in the petition,
8 as well as any procedural defenses which may be applicable.” ECF No. 77, p. 7.

9 In their answer, respondents argue that each of the grounds in Nichols’ petition is without
10 merit and that Nichols cannot establish cause and prejudice to excuse the procedural default of
11 grounds 3 through 6. In addition, respondents argue that grounds 2 through 6 are barred by the
12 statute of limitations and that grounds 3 through 6 are not cognizable in a federal habeas proceeding.

13 II. TIMELINESS

14 This action is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA).
15 AEDPA imposes a one-year filing period for § 2254 habeas petitions in federal court. 28 U.S.C. §
16 2244(d)(1). The one-year period begins to run from the latest of four possible triggering dates, with
17 the most common being the date on which the petitioner’s state court conviction became final (by
18 either the conclusion of direct appellate review or the expiration of time for seeking such review).
19 *Id.* Statutory tolling of the one-year time limitation occurs while a “properly filed” state post-
20 conviction proceeding or other collateral review is pending. 28 U.S.C. § 2244(d)(2).

21 Respondents concede that Nichols filed his initial petition herein within the one-year filing
22 period under § 2244(d)(1). Respondents argue, however, that the AEDPA statute of limitations
23 expired long before Nichols filed his second and third amended petitions in 2008 and 2011,

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1 respectively, and that grounds 2 through 6 do not "relate back" to the amended petition Nichols filed
 2 in 2005.¹

3 The Supreme Court's decision in *Mayle v. Felix*, 545 U.S. 644 (2005), significantly limits a
 4 habeas petitioner's ability to have newly-added claims "relate back" to the filing of an earlier petition
 5 and, therefore, be considered timely under 28 U.S.C. § 2244(d). In *Mayle*, the Court held that the
 6 Ninth Circuit's former relation-back standard under Federal Rule of Civil Procedure 15(c)(2) (now
 7 Rule 15(c)(1)(B)),² which allowed an amendment to a habeas petition to "relate back" to the date of
 8 the original petition "so long as the new claim stems from the habeas petitioner's trial, conviction, or
 9 sentence," was too broad. *Id.* at 656-57. The Court held that an amended claim in a habeas petition
 10 relates back for statute of limitations purposes only if it shares a "common core of operative facts"
 11 with claims contained in the original petition. *Id.* at 663-64. The common core of operative facts
 12 must not be viewed at too high a level of generality, and an "occurrence," for the purposes of Fed. R.
 13 Civ. P. 15(c), will consist of each separate set of facts that supports a ground for relief. *Id.* at 661.

14 Here, the court agrees that grounds 2 through 6 do not share a "common core of operative
 15 facts" with any of the claims in the amended petition filed in 2005. However, with the exception of
 16 ground 5, Nichols raised essentially the same claims in his *initial* petition – i.e., ground 2 was raised
 17 as ground 11 in the initial petition, ground 3 as ground 12, ground 4 as ground 10, and ground 6 as
 18 ground 13.

19 In the Ninth Circuit, an amended pleading supersedes any prior pleadings. *See, e.g., King v.*
 20 *Atiyeh*, 814 F.2d 565, 567 (9th Cir. 1987) ("All causes of action alleged in an original complaint
 21 which are not alleged in an amended complaint are waived."). Arguably, Nichols waived the

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 23 ¹ Nichols captioned his counseled 2008 and 2011 petitions as his first amended and second
 24 amended petitions, respectively, even though he had filed a pro se amended petition in 2005.

25 ² Effective December 1, 2007, former Fed. R. Civ. P. 15(c)(2) was amended for stylistic
 26 purposes only and recodified as Fed. R. Civ. P. 15(c)(1)(B).

1 relevant original claims when he left them out of his 2005 amended petition, then allowed the statute
 2 of limitations run with respect to those claims. This court cannot ignore, however, that the rationale
 3 for permitting relation back under Federal Rule 15(c) is that the defendants, because of the original
 4 complaint, are on notice of the subject matter of the dispute and will not be unduly surprised or
 5 prejudiced by the later complaint. *See Anthony v. Cambra*, 236 F.3d 568, 576 (9th Cir. 2000) (stating
 6 that one of the central policies of Rule 15(c) is to “ensur[e] that the non-moving party has sufficient
 7 notice of the facts and claims giving rise to the proposed amendment”).

8 Respondent responded to the relevant claims in the motion to dismiss they filed April 8, 2005
 9 (ECF No. 8), and therefore are not prejudiced by allowing the petitioner to proceed with those
 10 claims. Under these unusual circumstances, the court concludes that grounds 2, 3, 4, and 6 of
 11 Nichols’ current petition relate back to the date of the initial petition and are therefore timely.

12 With respect to ground 5, Nichols argues that the claim is timely under the doctrine of
 13 equitable tolling. Equitable tolling is appropriate only if the petitioner can show: (1) that he has
 14 been pursuing his rights diligently, and (2) that some extraordinary circumstance stood in his way
 15 and prevented timely filing. *Holland v. Florida*, 130 S.Ct. 2549, 1085 (2010). Equitable tolling is
 16 “unavailable in most cases,” *Miles v. Prunty*, 187 F.3d 1104, 1107 (9th Cir. 1999), and “the threshold
 17 necessary to trigger equitable tolling is very high, lest the exceptions swallow the rule,” *Miranda v.*
 18 *Castro*, 292 F.3d 1063, 1066 (9th Cir. 2002) (quoting *United States v. Marcello*, 212 F.3d 1005, 1010
 19 (7th Cir. 2000)). The petitioner ultimately has the burden of proof on this “extraordinary exclusion.”
 20 *Miranda*, 292 F.3d at 1065.

21 In ground 5, Nichols alleges that the trial court’s failure inquire into whether an actual
 22 conflict existed between him and his attorney denied him is constitutional right to effective
 23 assistance of counsel. He identifies the following as extraordinary circumstances that warrant
 24 equitable tolling for the claim: (1) the trial court’s incorrect advice regarding the remedy for the
 25 denial of his motion to dismiss counsel, (2) his trial counsel’s actual conflict of interest, (3)

1 ineffective assistance of trial and appellate counsel, and (4) ineffective assistance of post-conviction
 2 counsel. Even considered together, these circumstances fail to account for the delay in raising
 3 ground 5 that occurred after the conclusion of Nichols' initial state post-conviction proceeding. As
 4 such, he is not entitled to equitable tolling. *See Spitsyn v. Moore*, 345 F.3d 796, 799 (9th Cir. 2003)
 5 ("The prisoner must show that the extraordinary circumstances were the cause of his untimeliness.").
 6 *Accord Bryant v. Arizona Attorney General*, 499 F.3d 1056, 1061 (9th Cir. 2007). Ground 5 is
 7 dismissed as untimely under 28 U.S.C. § 2244(d).

8 III. PROCEDURAL DEFAULT

9 A federal court will not review a claim for habeas corpus relief if the decision of the state
 10 court regarding that claim rested on a state law ground that is independent of the federal question and
 11 adequate to support the judgment. *Coleman v. Thompson*, 501 U.S. 722, 730–31 (1991). The
 12 *Coleman* Court stated the effect of a procedural default, as follows:

13 In all cases in which a state prisoner has defaulted his federal claims in state court
 14 pursuant to an independent and adequate state procedural rule, federal habeas review
 15 of the claims is barred unless the prisoner can demonstrate cause for the default and
 actual prejudice as a result of the alleged violation of federal law, or demonstrate that
 failure to consider the claims will result in a fundamental miscarriage of justice.

16 501 U.S. at 750; *see also Murray v. Carrier*, 477 U.S. 478, 485 (1986).

17 In ruling upon respondents' motion to dismiss, this court determined that grounds 3, 4, and 6
 18 were procedurally defaulted in state court on independent and adequate state grounds, but reserved
 19 its decision on whether petitioner could demonstrate cause for the defaults and actual prejudice or
 20 that failure to consider the claims will result in a fundamental miscarriage of justice. ECF No. 77, p.
 21 5-7.

22 1. *Ground 3*

23 In ground 3, Nichols alleges that the trial court violated his constitutional right to present a
 24 defense when it rejected his lesser included/related offense instructions. He argues that the claim is
 25 not procedurally defaulted because it was not clear that he was entitled to relief on this theory until

1 the Nevada Supreme Court issued *Rosas v. State*, 147 P.3d 1101 (Nev. 2007), and that the Nevada
 2 Supreme Court's reliance on the time interval between *Rosas* and Nichols' presentation of the claim
 3 to the state court did not constitute an adequate and independent basis for denying ground 3. He also
 4 claims ineffective assistance of appellate counsel as grounds for failing to comply with state
 5 procedural requirements in presenting the claim to the state court.

6 Be that as it may, the claim fails even if it is not barred by the doctrine of procedural default.
 7 As noted by the respondents, there is no settled law that failure to instruct on a lesser included
 8 offense in a noncapital case would be constitutional error if there were evidence to support the
 9 instruction. *See Turner v. Marshall*, 63 F.3d 807, 819 (9th Cir. 1995), *overruled on other grounds by*
 10 *Tolbert v. Page*, 182 F.3d 677 (9th Cir. 1999). While *Beck v. Alabama*, 447 U.S. 625, 638 (1980),
 11 held that such failure is constitutional error in a *capital* case, the Ninth Circuit has declined to extend
 12 that holding in a noncapital case. *See Bashor v. Risley*, 730 F.2d 1228, 1240 (9th Cir.), *cert. denied*,
 13 469 U.S. 838 (1984). Thus, as explained by the court in *Turner*, "any finding of constitutional error
 14 would create a new rule, inapplicable to the present case under *Teague* [v. *Lane*, 489 U.S. 288
 15 (1989)]." *Turner*, 63 F.3d at 819. Accordingly, ground 3 is denied.

16 2. *Ground 4*

17 In ground 4, Nichols alleges that the trial court violated his constitutional right to present a
 18 defense when it excluded Shawna Wilder's written statement from the trial evidence. He argues that
 19 he can establish cause for the default because he received ineffective assistance of counsel on direct
 20 appeal. The problem with that argument is that a claim of ineffective assistance of counsel as cause
 21 to excuse a procedural default must itself be exhausted and not procedurally defaulted. *Edwards v.*
 22 *Carpenter*, 529 U.S. 446, 453 (2000). Such is not the case here, so Nichols cannot establish cause to
 23 excuse the default of ground 4.

24 Moreover, there is no actual prejudice arising from the alleged violation of federal law.
 25 Ground 4 is, in essence, a challenge to an evidentiary ruling under state law. The trial court excluded
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1 the written statement based on a finding that it did not appear to be “trustworthy.” ECF No. 45-19,
 2 p. 6-7. On direct appeal, the Nevada Supreme Court concluded that the trial court did not abuse its
 3 discretion in excluding the letter and cited to Nev. Rev. Stat. § 51.345, which provides that “[a]
 4 statement tending to expose the declarant to criminal liability and offered to exculpate the accused in
 5 a criminal case is not admissible unless corroborating circumstances clearly indicate the
 6 trustworthiness of the statement.”

7 The Nevada Supreme Court’s conclusion that the letter was properly excluded under state
 8 evidence law is binding on this court. *See Estelle v. McGuire*, 502 U.S. 62, 67–68 (1991) (a federal
 9 writ is not available for alleged error in the interpretation or application of state law); *Rhoades v.*
 10 *Henry*, 638 1027, 1034, n. 5 (9th Cir. 2011) (“[E]videntiary rulings based on state law cannot form an
 11 independent basis for habeas relief.”); *Jammal v. Van de Kamp*, 926 F.2d 918, 919–20 (9th Cir. 1991)
 12 (petitioner may not challenge evidentiary ruling on ground that it violated states's evidence code;
 13 failure to comply with state rules of evidence does not warrant federal habeas relief). Accordingly,
 14 ground 4 fails in a federal habeas proceeding.

15 3. *Ground 6*

16 In ground 6, Nichols alleges that the trial court violated his constitutional right to present a
 17 defense when it rejected his proposed instruction as to the proper way for weighing
 18 methamphetamine. Here again, Nichols argues that he can establish cause for the default because he
 19 received ineffective assistance of counsel on direct appeal. And for the same reason noted above
 20 with respect to ground 4, the argument fails.

21 As for whether Nichols can demonstrate actual prejudice, ground 6 is, like ground 4, a
 22 challenge to the trial court’s application of Nevada law. At the close of the trial, Nichols proposed
 23 the following jury instruction: “When methamphetamine is mixed with liquid which consists of
 24 unusable chemicals and/or by-products these additional products should not count towards
 25 determining the weight of the contraband.” ECF No. 45-21, p. 13. The trial court rejected the
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1 instruction stating that it “does not appear to be the law in the State of Nevada.” ECF No. 45-19, p.
 2 18.

3 Nichols contends that the trial court’s ruling was contrary to *Sheriff v. Seward*, 858 P.2d 48,
 4 50 and n.1 (Nev. 1992), where the Nevada Supreme Court noted that “unmarketable substances”
 5 should not be included in determining the quantity of a controlled substance. The respondents argue
 6 that the ruling was consistent with Nev. Rev. Stat. § 453.3385, the statute under which Nichols was
 7 charged, because it allowed for the weight of the specific substance “or any mixture which contains
 8 any such controlled substance.” Regardless of which party is correct, ground 6 presents an issue of
 9 state law that does not provide a basis for federal habeas relief. *See Estelle*, 502 U.S. at 67–68.
 10 Thus, ground 6 is dismissed.

11 IV. REMAINING GROUNDS

12 1. *Standard of Review*

13 Grounds 1 and 2 were each addressed on the merits by the Nevada Supreme Court. 28
 14 U.S.C. § 2254(d) sets forth the following standard of review under AEDPA for claims that have been
 15 adjudicated in state court:

16 An application for a writ of habeas corpus on behalf of a person in custody
 17 pursuant to the judgment of a State court shall not be granted with respect to any
 18 claim that was adjudicated on the merits in State court proceedings unless the
 19 adjudication of the claim –

20 (1) resulted in a decision that was contrary to, or involved an unreasonable
 21 application of, clearly established Federal law, as determined by the Supreme Court of
 22 the United States; or

23 (2) resulted in a decision that was based on an unreasonable determination of
 24 the facts in light of the evidence presented in the State court proceeding.

25 28 U.S.C. § 2254(d).

26 A decision of a state court is “contrary to” clearly established federal law if the state court
 arrives at a conclusion opposite that reached by the Supreme Court on a question of law or if the
 state court decides a case differently than the Supreme Court has on a set of materially
 10

1 indistinguishable facts. *Williams v. Taylor*, 529 U.S. 362, 405–06 (2000). An “unreasonable
 2 application” occurs when “a state-court decision unreasonably applies the law of [the Supreme
 3 Court] to the facts of a prisoner’s case.” *Id.* at 409. “[A] federal habeas court may not “issue the
 4 writ simply because that court concludes in its independent judgment that the relevant state-court
 5 decision applied clearly established federal law erroneously or incorrectly.” *Id.* at 411.

6 The Supreme Court has explained that “[a] federal court’s collateral review of a state-court
 7 decision must be consistent with the respect due state courts in our federal system.” *Miller-El v.
 8 Cockrell*, 537 U.S. 322, 340 (2003). The “AEDPA thus imposes a ‘highly deferential standard for
 9 evaluating state-court rulings,’ and ‘demands that state-court decisions be given the benefit of the
 10 doubt.’” *Renico v. Lett*, 559 U.S. 766, 773 (2010) (quoting *Lindh v. Murphy*, 521 U.S. 320, 333, n. 7
 11 (1997); *Woodford v. Viscotti*, 537 U.S. 19, 24 (2002) (per curiam)). “A state court’s determination
 12 that a claim lacks merit precludes federal habeas relief so long as ‘fairminded jurists could disagree’
 13 on the correctness of the state court’s decision.” *Harrington v. Richter*, 131 S.Ct. 770, 786 (2011)
 14 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has emphasized
 15 “that even a strong case for relief does not mean the state court’s contrary conclusion was
 16 unreasonable.” *Id.* (citing *Lockyer v. Andrade*, 538 U.S. 63, 75 (2003)); *see also Cullen v.
 17 Pinholster*, 131 S.Ct. 1388, 1398 (2011) (describing the AEDPA standard as “a difficult to meet and
 18 highly deferential standard for evaluating state-court rulings, which demands that state-court
 19 decisions be given the benefit of the doubt”) (internal quotation marks and citations omitted).

20 “[R]eview under § 2254(d)(1) is limited to the record that was before the state court that
 21 adjudicated the claim on the merits.” *Pinholster*, 131 S.Ct. at 1398. In *Pinholster*, the Court
 22 reasoned that the “backward-looking language” present in § 2254(d)(1) “requires an examination of
 23 the state-court decision at the time it was made,” and, therefore, the record under review must be
 24 “limited to the record in existence at that same time, i.e., the record before the state court.” *Id.*
 25 . . .

26

1 2. *Ground 1*

2 In ground 1, Nichols alleges that he was denied his constitutional right to effective assistance
 3 of counsel on appeal because appellate counsel failed to argue that there was insufficient evidence to
 4 support a finding of guilt for the charged crimes. According to Nichols, the evidence presented at
 5 trial failed to establish beyond a reasonable doubt that he was ever in actual or constructive
 6 possession of the drugs at issue. More specifically, he contends that there was no evidence that, at
 7 any time, he had exclusive access to the hotel room where the drugs were found. He also points to
 8 the time gap of several hours between the time he was arrested and the time the police discovered the
 9 drugs coupled with the fact that Shawna Wilder and perhaps others had access to the hotel room
 10 during that period.

11 A criminal defendant enjoys the right to the effective assistance of counsel on appeal. *Evitts*
 12 *v. Lucey*, 469 U.S. 387, 391–97 (1985). The federal court considers claims of ineffective assistance
 13 of appellate counsel according to the standard set forth in *Strickland v. Washington*, 466 U.S. 668
 14 (1984). *Miller v. Keeney*, 882 F.2d 1428, 1433–34 (9th Cir. 1989). Petitioner must show that
 15 appellate counsel's representation fell below an objective standard of reasonableness, and that, but
 16 for counsel's errors, a reasonable probability exists that he would have prevailed on appeal. *Id.*
 17 (citing *Strickland*, 466 U.S. at 688, 694). The *Strickland* standard for prejudice is higher than the
 18 standard of harmlessness that applies to other types of errors in habeas cases. *See Kyles v. Whitley*,
 19 514 U.S. 419, 436 (1995).

20 The federal standard used to test whether sufficient evidence supports a state conviction is the
 21 “rational factfinder” standard established in *Jackson v. Virginia*, 443 U.S. 307 (1979). *Mikes v.*
 22 *Borg*, 947 F.2d 353, 356 (9th Cir. 1991). Under that standard, the court inquires as to “whether, after
 23 viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could
 24 have found the essential elements of the crime beyond a reasonable doubt.” *Jackson*, 443 U.S. at
 25 319 (citation omitted).

26

1 In petitioner's first state post-conviction proceeding, the state district court addressed the
 2 claim now raised as ground 1 as follows:

3 Petitioner contends that appellate counsel should have attacked the sufficiency
 4 of the evidence at trial. This was the main thrust of Petitioner's case at trial. Mr.
 5 Stewart, at every occasion possible, challenged and contended that there was not
 6 enough evidence linking the Petitioner to the hotel room where the drugs were
 7 found, and therefore, he could not be found guilty of "constructively possessing" the
 8 drugs. Therefore, Petitioner was not guilty of trafficking. Evidently, the jury in this
 9 case disagreed with the contention of Petitioner and his trial counsel. The question
 10 then becomes whether appellate counsel should have raised the issue of whether there
 11 was sufficient evidence to convict at trial.

12 In reviewing evidence supporting a jury's verdict, a court must determine
 13 whether the jury acting reasonably could have been convinced beyond a reasonable
 14 doubt of the Defendant's guilt by competent evidence. *Wilkins v. State*, 96 Nev. 367,
 15 374, 609 P.2d 309 (1980). Where conflicting testimony is presented, the jury
 16 determines what weight and credibility to give it. *Bolden v. State*, 97 Nev. 71, 72,
 17 624 P.2d 20 (1981). Therefore, the Court, in this instance, must ask, "whether, after
 18 viewing the evidence in the light most favorable to the prosecution, any rational trier
 19 of fact could have found the essential elements of the crime beyond a reasonable
 20 doubt." *Braunstein v. State*, 18 Nev. Adv. Op. 8 (2002); *Koza v. State*, 100 Nev. 245,
 21 250, 681 P.2d 44 (1984).

22 The trial in this case was presented with two competing theories of who
 23 possessed [and] trafficked the drugs in question. The Petitioner and Ms. Wilder
 24 possessed and trafficked in the drugs or that Ms. Wilder and Ms. Nichols trafficked in
 25 the drugs. The jury, evidently, in judging the credibility of the witnesses and the
 26 quality and quantity of the evidence presented at trial believed that Petitioner and Ms.
 1 Wilder possessed and trafficked in the drugs. In the instant case, the Defendant was
 2 driving the car that was located at the Rainbow Casino with various items of drug
 3 paraphernalia and his personal belongings located therein. Shawna Wilder
 4 approached and inquired about the Defendant at the time he was being confronted and
 5 arrested by the sheriff's deputies. Shawna Wilder admitted to the sheriff's deputies
 6 that she had stayed in the hotel room (room 1404) at the Rainbow Casino with the
 7 Defendant and there was no evidence that Lisa Nichols had ever stayed in that hotel
 8 room even though the hotel room was registered to her. There was male clothing
 9 found in room 1404 of the Rainbow Casino. Lieutenant Cook's opinion that based on
 10 the amount of clothing that one man and one woman occupied the hotel room in
 11 question, the chemical odor associated with methamphetamine manufacture detected
 12 by Lieutenant Cook upon his entry into the hotel room, the fact that Defendant's
 13 driver's license was located in a day planner found in luggage located in the hotel
 14 room was apparently sufficient for the jury to convict the Defendant. There was
 15 certainly more evidence presented linking the Petitioner to the hotel room in question
 16 thereby providing proof beyond a reasonable doubt that Petitioner had constructively
 17 possessed the cocaine and methamphetamine in question, than was present in the case
 18 of *Marshall v. State*, 110 Nev. 1328, 885 P.2d 603 (1994).

1 . . . [A]fter viewing the evidence in the light most favorable to the
2 prosecution, there was sufficient evidence presented at trial upon which the trial jury,
3 acting as a rational trier of fact, could have found the elements of trafficking in a
4 controlled substance by constructive possession necessary to convict the Petitioner
5 beyond a reasonable doubt. This would excuse Mr. Stewart from arguing
“sufficiency of the evidence” on appeal.

6 ECF No. 47-6, p. 9-10.

7 On appeal from that decision, the Nevada Supreme Court adjudicated this claims as follows:

8 In this case, the district court found that counsel were not ineffective under the
9 standard set forth in *Strickland v. Washington*. [Fn: 466 U.S. 668 (1984).] The
10 district court's factual findings regarding a claim of ineffective assistance of counsel
11 are entitled to deference when reviewed on appeal. [Fn: See *Riley v. State*, 110 Nev.
12 638, 647, 878 P.2d 272, 278 (1994).] Nichols has not demonstrated that the district
13 court's finding that counsel were not ineffective was not supported by substantial
14 evidence or was clearly wrong. Moreover, Nichols has not demonstrated that the
15 district court erred as a matter of law.

16 ECF No. 47-12, p. 3-4.

17 Sufficiency of the evidence claims are judged by the elements defined by state law. *Jackson*,
18 443 U.S. at 324 n. 16. As noted, Nichols' challenge to the sufficiency of the evidence is premised on
19 a contention that the evidence did not show that he was in actual or constructive possession of the
20 drugs at issue.

21 The Nevada Supreme Court has explained the doctrine of constructive possession under
22 Nevada law as follows:

23 Possession may be actual or constructive. The accused has constructive
24 possession only if she maintains control or a right to control the contraband. For
25 instance, possession may be imputed when the contraband is found in a location
26 which is immediately and exclusively accessible to the accused and subject to her
dominion and control. Even if the accused does not have exclusive control of the
hiding place possession may be imputed if she has not abandoned the narcotic and no
other person has obtained possession. The accused is also deemed to have the same
possession as any person actually possessing the narcotic pursuant to her direction or
permission where she retains the right to exercise dominion or control over the
property.

1 *Glispey v. Sheriff, Carson City*, 510 P.2d 623, 624 (Nev. 1973) (citation omitted). Thus, immediate
 2 and exclusive access to the location where the contraband is found is one way to establish
 3 constructive possession under Nevada law, but it is not the only way.

4 Here, a rational factfinder viewing the evidence in the light most favorable to the prosecution
 5 could have found, beyond a reasonable doubt, that Nichols, at the time of his arrest, had retained the
 6 right to exercise dominion or control over the drugs. The jury was presented with undisputed
 7 evidence that, in the few days leading up to his arrest, Nichols had purchased a large quantity of
 8 ephedrine, an ingredient used to make methamphetamine. And, as recounted by the state district
 9 court in the excerpt above, there was ample evidence that Nichols was involved in the use and
 10 manufacture of drugs and that he was occupying the hotel room where the drugs were found.

11 Because the sufficiency of the evidence claim is without merit, Nichols' appellate counsel
 12 cannot be deemed deficient for failing to raise the claim. In addition, Nichols cannot demonstrate
 13 that appellate counsel's failure to raise the claim prejudiced him. At a minimum, fairminded jurists
 14 could disagree as to the correctness of the Nevada Supreme Court's decision to deny the ineffective
 15 assistance of appellate counsel claim.

16 Based on the foregoing, the Nevada Supreme Court's decision was not contrary to, and did
 17 not involve an unreasonable application of clearly established federal law and was not based on an
 18 unreasonable determination of the facts in light of the evidence presented. Accordingly, Nichols is
 19 not entitled to habeas relief with respect to ground 1.

20 3. *Ground 2*

21 In ground 2, Nichols alleges that his constitutional rights were violated because the trial court
 22 mishandled a juror's acknowledgment of multiple contacts with a key defense witness. According to
 23 Nichols, defense witness Mark Humphries "verbally confronted" juror Ramona Hintz in the
 24 courthouse parking lot a day or two prior to his trial testimony and complained about delay in being

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1 called as a witness. Nichols further alleges that, following his testimony, Humphries waved at Hintz
 2 from an adjacent vehicle, prompting her to write note to the trial judge about the contacts.

3 Nichols argues that the trial court's inquiry into the matter was incomplete and inadequate.
 4 Specifically, Nichols contends that the trial court asked Hintz suggestive leading questions about the
 5 matter before defense counsel had an opportunity to question her. In addition, Nichols faults the trial
 6 court for not asking whether the contacts had reduced her belief in Humphries' credibility in light of
 7 the fact that Hintz had indicated that the contacts had given her a negative impression of him.

8 In *Mattox v. United States*, 146 U.S. 140 (1892), the Supreme Court held that “[p]rivate
 9 communications, possibly prejudicial, between jurors and third persons, or witnesses, or the officer
 10 in charge, are absolutely forbidden, and invalidate the verdict, at least unless their harmlessness is
 11 made to appear.” *Mattox*, 146 U.S. at 150. In *Remmer v. United States*, 347 U.S. 227 (1954), the
 12 Supreme Court reversed a conviction under *Mattox* when it was shown that during the trial someone
 13 had told the jury foreman that he could profit by acquitting the defendant. *Remmer*, 347 U.S. at 228.
 14 The Court in *Remmer* held that *Mattox*'s “presumption is not conclusive, but the burden rests heavily
 15 upon the Government to establish, after notice to and hearing of the defendant, that such contact with
 16 the juror was harmless to the defendant.” *Id.* at 229.

17 The Supreme Court has also recognized, however, that “it is virtually impossible to shield
 18 jurors from every contact or influence that might theoretically affect their vote.” *Smith v. Phillips*,
 19 455 U.S. 209, 217 (1982). Thus, the Ninth Circuit has held that, when an unauthorized
 20 communication with a juror was “*de minimis*,” “the defendant must show that the communication
 21 could have influenced the verdict before the burden of proof shifts to the prosecution.” *Caliendo v.*
 22 *Warden of Cal. Men's Colony*, 365 F.3d 691, 696 (9th Cir. 2004). A communication is possibly
 23 prejudicial – i.e., not *de minimis*, if it “raises a risk of influencing the verdict.” *Id.* at 697.

24 On direct appeal, the Nevada Supreme Court adjudicated the claim now raised as ground 2 as
 25 follows:

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1 Nichols next contends that the district court erred in not dismissing juror
 2 Ramona Hintz. Hintz allegedly had communications with one of Nichols' witnesses.
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4 Not every contact between a juror and a witness merits a new trial, and the
 5 matter is subject to the discretion of the district court. [Fn: *Roever v. State*, 111 Nev.
 6 1052, 1055, 901 P.2d 145,146 (1995)]. A new trial must be granted unless it appears
 7 beyond a reasonable doubt that the contact did not prejudice the defendant. *Id.*

8 Here, Hintz told the court that the day before Nichols' witness testified, the
 9 witness told her to tell the district court "that I have been sitting here since 9:30
 10 [a.m.]." The witness also waved to Hintz the next day. Hintz assured the district
 11 court that this witness contact had no bearing on her ability to be fair or otherwise
 12 prejudice her as a juror.

13 The district court concluded that the contact was incidental. We agree. The
 14 record demonstrates beyond a reasonable doubt that this minimal contact had no
 15 prejudicial effect on juror Hintz. Accordingly, we conclude that Nichols' contention
 16 is without merit.

17 ECF No. 46-25, p. 12.

18 Although the Nevada Supreme Court did not cite any U.S. Supreme Court authority, the
 19 "harmless beyond a reasonable doubt" standard that it applied was consistent with the holding in
 20 *Remmer*. See *United States v. Rutherford*, 371 F.3d 634, 641 (9th Cir. 2004) (noting that *Remmer*
 21 standard places "a heavy burden on the government to rebut the presumption by proving that the
 22 error was harmless beyond a reasonable doubt."). This is sufficient for the a decision to avoid being
 23 "contrary to" clearly established federal law for the purposes of § 2254(d). See *Early v. Packer*, 537
 24 U.S. 3, 8 (2002) (noting that, irrespective of whether state court decision cites U.S. Supreme Court
 25 cases, it will not run afoul of the "contrary to" clause so long as neither the reasoning nor the result
 26 of the decision contradicts Supreme Court precedent).

27 As for the state court's conclusion that the contacts had no prejudicial effect, the court in
 28 *Caliendo* identified the factors to be considered in making that determination:

29 Whether an unauthorized communication between a juror and a third party
 30 concerned the case is but one factor in determining whether the communication raised
 31 a risk of influencing the verdict. Other factors may include the length and nature of
 32 the contact, the identity and role at trial of the parties involved, evidence of actual
 33 impact on the juror, and the possibility of eliminating prejudice through a limiting
 34 instruction. In weighing these factors we generally accord some deference to the
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1 findings of the trial judge, who is in the best position to determine whether possibly
 2 prejudicial misconduct took place and, if so, whether the government clearly
 established harmlessness.

3 *Caliendo*, 365 F.3d at 697-98 (citation omitted).

4 In arguing that the Nevada Supreme Court’s decision was an unreasonable application of
 5 clearly established federal law and based on an unreasonable determination of the facts, Nichols
 6 attempts to analogize his case to *Caliendo*, where the court concluded that the government had not
 7 proved harmlessness. In *Caliendo*, however, “three deliberating jurors chatted amiably and at length
 8 with the critical prosecution witness in an uncontrolled setting.” *Id.* at 699. In addition, the “case
 9 was close,” with Caliendo’s first trial ending in hung jury with seven jurors voting to acquit. *Id.* at
 10 698-99. These important factors serve to distinguish *Caliendo* from the instant case.

11 Nichols asserts that Humphries’ testimony was “extremely important” because he was the
 12 only defense witness to establish that Lisa Nichols was a real person who had been in Wendover at
 13 the relevant time. However, the testimony was not nearly critical as the testimony of the witness in
 14 *Caliendo*, which stood at the center of the prosecution’s case. *Id.* While it may have been helpful to
 15 the defense, Humphries’ testimony was by no means pivotal given that the jury could have accepted
 16 it as entirely credible and still had ample evidence upon which to find Nichols guilty. In addition,
 17 the contacts between Humphries and Hintz were fleeting chance encounters, with no discussion of
 18 the case and little, if any, potential for the contacts to significantly influence Hintz’s opinion of
 19 Humphries’ credibility. The Nevada Supreme Court’s decision to reject ground 2 was not an
 20 unreasonable application of Supreme Court precedent, nor was it based on an unreasonable
 21 determination of the facts. Ground 2 is denied.

22 IV. CONCLUSION

23 For the reasons set forth above, Nichols’ petition for habeas relief is denied.

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Certificate of Appealability

This is a final order adverse to the petitioner. As such, Rule 11 of the Rules Governing Section 2254 Cases requires this court to issue or deny a certificate of appealability (COA). Accordingly, the court has *sua sponte* evaluated the claims within the petition for suitability for the issuance of a COA. See 28 U.S.C. § 2253(c); *Turner v. Calderon*, 281 F.3d 851, 864-65 (9th Cir. 2002).

Pursuant to 28 U.S.C. § 2253(c)(2), a COA may issue only when the petitioner "has made a substantial showing of the denial of a constitutional right." With respect to claims rejected on the merits, a petitioner "must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000) (citing *Barefoot v. Estelle*, 463 U.S. 880, 893 & n.4 (1983)). For procedural rulings, a COA will issue only if reasonable jurists could debate (1) whether the petition states a valid claim of the denial of a constitutional right and (2) whether the court's procedural ruling was correct. *Id.*

Having reviewed its determinations and rulings in adjudicating Nichols' petition, the court finds that none of those rulings meets the *Slack* standard. The court therefore declines to issue a certificate of appealability for its resolution of any procedural issues or any of Nichols' habeas claims.

18 **IT IS THEREFORE ORDERED** that the petition for writ of habeas corpus (ECF No. 62) is
19 DENIED.

IT IS FURTHER ORDERED that a certificate of appealability is DENIED.

21 || Dated August 18, 2015.

James C. Mahan
UNITED STATES DISTRICT JUDGE